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February 15, 2008

VIA E-FILING

The Honorable Anne K. Quinlan, Acting Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

Re: STB Finance Docket No. 35081
Canadian Pacific Railway Company, et al. – Control – Dakota, Minnesota & Eastern Railroad Corp., et al.

Dear Secretary Quinlan:

The Kansas City Southern Railway Company ("KCSR") hereby files, via e-filing, its Reply In Opposition to Applicants' Emergency Motion For Issuance Of A Protective Order ("KCSR-1") in the above captioned matter. If there are any questions concerning this e-filing, please contact me by telephone at (202) 663-7823 or by e-mail at wmullins@bakerandmiller.com.

Sincerely,

William A. Mullins

Enclosures

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET. NO. 35081

CANADIAN PACIFIC RAILWAY COMPANY, ET AL.

– CONTROL –

DAKOTA, MINNESOTA & EASTERN RAILROAD CORP., ET AL

THE KANSAS CITY SOUTHERN RAILWAY COMPANY'S REPLY IN OPPOSITION TO APPLICANTS' EMERGENCY MOTION FOR ISSUANCE OF A PROTECTIVE ORDER

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Attorneys for The Kansas City Southern Railway Company

Dated: February 15, 2008

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INTRODUCTION AND BRIEF SUMMARY OF ARGUMENT

The Kansas City Southern Railway Company ("KCSR") hereby submits its reply in opposition to the "Emergency Motion of Applicants for Issuance of a Protective Order" ("Emergency Motion") filed on February 14, 2008, by the Applicants, collectively, Canadian Pacific Railway Company ("CPR"); Soo Line Holding Company ("SOO")(CPR and SOO collectively, "CP"); Dakota, Minnesota & Eastern Railroad Corporation ("DM&E"); and Iowa, Chicago & Eastern Railroad Corporation ("IC&E")(collectively, "DME"), and submits this motion to compel the deposition of Ms. McQuade, CPR's Executive Vice-President and Chief Operating Officer. Furthermore, KCSR seeks clarification from the Board that deponents should answer all questions that are relevant to the Board's analysis of whether the transaction will result in a reduction of competition, including questions related to the competitive impact on the movement of grain, including grain that is currently the subject an agreement governing the movement of grain between origins on IC&E and destinations on KCSR.[1]

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[1] Applicants have filed the Emergency Motion to quash the "Notice of Deposition of Kathryn B. McQuade" ("Deposition Notice") served on Applicants on February 11, 2007, and have also stated that they will direct individuals to be deposed not to answer questions

Applicants' attempt to shield Ms. McQuade from deposition, and their refusal to cooperate with a line of questioning designed, at a minimum, to lead to the discovery of admissible evidence runs contrary to Board-enunciated principles of broad and open discovery.[2] Ms. McQuade is a high-ranking executive with overall responsibility for strategic planning, operations, and relations with other railroads. Quashing the deposition of Ms. McQuade would preclude KCSR from fully obtaining information in Applicants' sole possession that is highly relevant to whether or not – (1) CPR has exercised unlawful control of DM&E and IC&E prior to approval of the transaction; (2) the extent to which CPR and the Union Pacific Railroad Company ("UP"), who have numerous cooperative arrangements, compete against IC&E and KCSR for the movement of grain to destinations in Arkansas, Mississippi, and other southern states so that CP's acquisition of DME will reduce that competition, and (3) the competitive impact of the transaction on the contract between IC&E and KCSR. Ms McQuade is the CP executive most likely to have this knowledge, and none of CP's or DME's witnesses addressed these issues or would have the level of knowledge and expertise of Ms. McQuade.[3]

CP's counsel has also made it clear that he intends to instruct all deponents to refuse to answer any questions not directly flowing from the witnesses' verified statements and that he direct them to refuse, in particular, to answer questions regarding the movement of grain

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related to the movements of grain covered by the agreement between IC&E and KCSR.

[2] Farmland Industries, Inc. v. Gulf Central Pipeline Company, et al., No. 40411 (ICC served Feb 24, 1993) ("Farmland Industries") ("We agree with Farmland that depositions are not disfavored. . . depositions simply require the balancing of competing interests. The interests to be balanced are the need for information in support of reasoned decision making and whatever burdens may result from the information-gathering process.).

[3] It is possible that Mr. Green, President and CEO, who did provide a verified statement in the proceeding, would also have similar knowledge, or perhaps Ms. Marcella Szel, CPR's Senior Vice President of Sales and Marketing. If the Board quashes the deposition of Ms McQuade on the basis that she did not submit a verified statement or that she cannot provide the relevant information, KCSR will likely seek to depose these other CPR executives.

from IC&E origins in Iowa and Minnesota to destinations in Arkansas and Mississippi. Such limitations on the scope of depositions are inconsistent with Board practice and policy and would prevent KCSR from fully addressing all of the potential competitive issues in the case. As such, the Board should direct all deponents to respond to any and all questions related to competitive issues, especially involving the transportation of grain.

In short, the Emergency Motion should be denied. The Board should compel the deposition of Ms. McQuade and instruct deponents to answer all questions relevant to the competitive concerns, including issues regarding the IC&E/KCSR contract.

ARGUMENT

I. CP'S EFFORT TO PREVENT THE DEPOSITION OF MS. MCQUADE IS INCONSISTENT WITH THE BOARD'S RULES AND PRIOR CASES

The essence of Applicants' objection to the deposition of Ms. McQuade turn s upon a narrow interpretation of the Board's discovery rules that does not comport with precedent on the subject of discovery. In fact, the scope of discovery in Board proceedings such as this is quite broad. The Board's 1996 modification to 49 CFR 1114.21 of its Rules of Practice[4] provides in pertinent part

> (a) When discovery is available.
>
> (1) Parties may obtain discovery . . . regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding . . .
>
> (2) It is not grounds for objection that the information sought will be inadmissible as evidence if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Prior to these modifications, a party seeking to depose a witness needed prior

[4] These modifications were adopted by the Board in Expedited Procedures for Processing Rail Rate Reasonableness, Exemption and Revocation Proceedings, STB Ex Parte No 527 (STB served Oct. 1 and Nov. 15, 1996) ("Expedited Procedures"), aff'd sub nom, United Transp. Union-Ill. Legis. Bd. v STB, [rest of cite] (D.C. Cir. 1998).

approval from the Interstate Commerce Commission or an officer acting under the authority of the ICC. The 1996 modifications eliminated "the requirement that Board approval be sought for discovery procedures other than written interrogatories and requests for admission [i.e. depositions] " FMC Wyoming Corporation and FMC Corporation v. Union Pacific Railroad Company, STB Docket No. 42022, slip op at 3 (STB served Feb. 5, 1998) ("FMC Wyoming"). In that proceeding, the Board noted that the overall goal of the modifications was to expedite the discovery process, acknowledging that the prior discovery rules "had the potential to impede expeditious discovery and [] generated too much paperwork." Id. at n.8. The modifications put no limitations on who could be deposed other than the general requirement that the information sought be relevant and that the deponent would have knowledge of such information.[5] Indeed, a proponent for a deposition does not have to meet a high burden in order to have the Board order the taking of a deposition. Farmland Industries ("The proponent of depositions is not subject to an extraordinary burden of proof; a proponent will prevail upon a simple preponderance of the evidence").

The deposition of Ms McQuade requested by Petitioners falls well within the broad parameters of the Board's discovery rules and policy. In addition, KCSR notes that, unlike the adjudication process before courts, in the instant proceeding there will be no oral hearing with cross-examination of witnesses. Therefore, the discovery process is the sole means by which KCSR will be able to obtain information on the potential anticompetitive impacts of the proposed Transaction, which KCSR could then use to develop its evidence and argument in favor of either denial of the Application or approval contingent upon acceptance of conditions designed to ameliorate those harms.

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5 Honey Creek Railroad, Inc – Petition For Declaratory Order, STB Finance Docket No 34869 (STB served July 20, 2006)(denying motion to quash deposition where discovery is already authorized)

More importantly, the Board has stated that depositions may be avoided only where the party objecting to such discovery can show that the proposed deposition would be abusive. FMC Wyoming ("the party seeking depositions no longer has the burden of justifying them under the "failure or delay of justice" standard; rather, the party opposing depositions must demonstrate, as in other modes of discovery, that the depositions are abusive. This is consistent with the overall goal of expediting the discovery process"). All of its other objections notwithstanding, Applicants do not contend that KCSR is using depositions as a method of abuse. Indeed, it would be difficult for Applicants to so argue in light of their willingness to allow the depositions of three other individuals.

Instead of arguing abuse, Applicants seem to contend that the deposition of Ms. McQuade should be quashed because – (1) she is a "non-witness," having not supplied a verified statement and therefore cannot be deposed; (2) she is governed by a form of "upper executive privilege," insofar as a CPR executive of CPR's stature should not be subjected to discovery; and (3) her deposition cannot lead to the introduction of relevant evidence. The decision Applicants rely upon in support of these propositions – Ocean Logisitcs Management, Inc. v. NPR, Inc., Docket No. WCC-102 (STB served Jul. 27, 1999) ("Ocean Logistics"), supports none of them

Non-testifying witnesses may be deposed The truth is that the Board's discovery rules confer no such categorical immunity from deposition upon non-witnesses, and are, in fact, to be construed liberally to facilitate deposition of individuals, such as Ms. McQuade, who are uniquely qualified to address strategic plans and overall marketing policies. Indeed, Ocean Logistics itself undercuts Applicants' "no deposition of non-testifying witnesses argument," because the Board stated in Ocean Logistics that a non-witness executive (or, in that case, a director) may have "information that is either directly relevant to this proceeding or may reasonably lead to the discovery of admissible evidence." Rather, the Board quashed

the deposition of the director in Ocean Logistics because it was apparent that the opposing party had employees that possessed the information sought of the director and therefore would be better subjects for deposition. Indeed, there is no regulation prohibiting the deposition of non-testifying witnesses. Most, if not all, discovery guidelines adopted in prior cases provided that such non-witnesses could be deposed, e.g. Canadian National Railway Company, et al. – Control – Illinois Central Railroad Company, et al., STB Finance Docket No. 33556, Decision No. 18 (STB served Nov. 4, 1998), and the Board has noted that non-witnesses can be deposed.[6]

As to the "upper executive privilege claim," while Ocean Logistics did quash the deposition of a high-ranking executive who had not provided a verified statement, it did so not on the grounds that a non-witness could not be deposed or on the grounds that high-ranking executives cannot be deposed, but rather because:

> [W]e believe that complainant can, in fact, acquire any such information that might exist through other means less burdensome to the defendants. In particular, we agree with NPR that there are undoubtedly employees of Holt and NPR who, unlike Mr. Holt, have direct knowledge of the events surrounding the 1996 agreement We will therefore grant defendants' motion for a protective order to quash Mr. Holt's deposition at this time

Here, the Applicants have not argued that the deposition of Ms. McQuade is "burdensome," nor could they. KCSR has offered to travel to any location, including Calgary, Canada, at its own expense, and on any date between now and February 28. KCSR has also offered to only take one half day of Ms. McQuade's time. The only "burden" cited by CP seems to be that Ms. McQuade's schedule would not accommodate any time for a half day deposition. Of course this argument could be applied to any high ranking railroad

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[6] See, e.g., Union Pacific, et. al – Control and Merger – Southern Pacific, et. al, Finance Docket No. 32760, Decision 20 (ICC served March 20, 1996) (upholding ALJ's decision to quash the deposition of a non-testifying witness but noting that "non-testifying witnesses are under the purview of the discovery guidelines," and "an outright ban on depositions of non-testifying witnesses would be inconsistent" with the discovery guidelines).

executive and has never formed the basis for a Board decision quashing a deposition. Tongue River Railroad Company, Inc. – Construction And Operation – Western Alignment, STB Finance Docket No. 30186 (Sub-No 3), 2003 STB LEXIS 719, (STB Served Nov 10, 2003) (denying motion to quash because of scheduling issues and lateness of deposition notice request) CP knows full well that they are in a regulatory proceeding that is subject to discovery and depositions and that its executives may be called upon to testify [7] In fact, if Ms. McQuade's "schedule" is the true issue, then KCSR would have no objection to taking that deposition after the March 4 deadline and then supplementing the record based upon that deposition, with the corresponding additional time for Applicants to address any supplement in reply.

Likewise, and unlike the Ocean Logistics case, CPR has not claimed that there are other more appropriate employees with knowledge of the competitive issues in this proceeding or that Ms. McQuade has no relevant knowledge to those competitive issues. CP's counsel did not even bother to confer with counsel for KCSR to determine the exact nature of the questions that would be directed to Ms. McQuade. Although the notice of deposition provides a very general outline of subject matter, KCSR fully contemplated that the notice would result in informal consultation to provide greater specificity on the issues surrounding the deposition. But Applicants did not do so, choosing instead to infer the subject matter based on the scope of settlement discussions. Because Applicants have not bothered to gain a fuller understanding regarding the deposition subject matter, they cannot, unlike the opponents to discovery in Ocean Logistics, offer other CPR employees as alternatives to Ms. McQuade.

[7] Applicants' insistence that Ms McQuade's schedule is too full to permit for the scheduling of a deposition at this juncture is undercut by Applicants' claim that Ms. McQuade is in some way immune from discovery, and suggests instead, that KCSR's deposition notice might not have been objected to had the notice of deposition been served earlier on.

Finally, Ms. McQuade is relevant to the competitive issues surrounding this case. KCSR's accepts CP's representations that Ms. McQuade was not personally involved in "the transaction or the preparation of the Application" and was not involved with the negotiations that led to the grain agreement between KCSR and IC&E. However, Ms. McQuade, as EVP and COO, has direct knowledge of CP's existing competitive relationships with UP, the routings covered by that relationship, the extent to which CP views the IC&E/KCSR routings as competing against CP/UP routings, the existing and future markets for CP originated and terminated grain, the reasons why CP does not believe it is appropriate to discuss CP's relationships with KCSR at this time, and the extent of communications between the Trustee and CP regarding CP's views with respect to whether or not to extend the IC&E/KCSR grain agreement. No other witness who provided a verified statement would have this information and CP has not offered to provide "other witnesses" with such information.

Indeed, KCSR's discovery (both written and through depositions) does not simply seek to explore issues surrounding the KCSR/IC&E grain agreement, although those issues are certainly relevant. Instead, KCSR plans to fully explore all of the competitive issues. Indeed, in order to obtain a condition to the transaction, KCSR must establish that there is a competitive harm to the transaction. In doing so, KCSR cannot and should not be limited solely to relying upon the Application, the workpapers, and the existing witnesses. If that were the standard, there would never be a need for discovery.

The simple fact is that quashing the Deposition Notice of Ms. McQuade would preclude KCSR from fully obtaining information in Applicants' sole possession that is highly relevant to whether or not (1) CPR has exercised unlawful control of DM&E and IC&E prior to approval of the transaction; (2) the extent to which CPR and UP compete against IC&E and KCSR for the movement of grain to destinations in Arkansas, Mississippi, and other southern states so that CP's acquisition of DME will reduce that competition; and (3) the

competitive impact of the transaction on the contract between IC&E and KCSR. Ms. McQuade is the most likely CP executive with this knowledge and none of CP's or DME's witnesses addressed these issues or would have the level of knowledge and expertise of Ms. McQuade. As such, the deposition of Ms McQuade is in fact "reasonably calculated to lead to the discovery of admissible evidence."

II. DEPONENTS SHOULD BE REQUIRED TO ADDRESS ALL ISSUES RELATED TO COMPETITIVE CONCERNS

In addition to attempting to quash the deposition of Kathryn McQuade, CP has also informed that Board that it will instruct its witnesses to not answer any questions regarding the IC&E/KCSR grain agreement. Because KCSR anticipates anticompetitive consequences would flow from the proposed Transaction, unless those impacts are addressed by the institution of new, or the preservation of existing, ameliorative mechanisms, it is inherently reasonable that KCSR would seek to focus on the anticompetitive aspects of the Transaction and to ask about the effectiveness of certain KCSR-IC&E agreements to address those competitive concerns. It is not reasonable to suggest that such a line of questioning would not be relevant for presenting evidence on competition issues in connection with the Transaction, simply because the Applicants declare, without explanation, that such is the case. In effect, Applicants attempt to litigate the competition issues related to the Transaction via a discovery dispute, which, of course, is not the correct forum for evaluating the strengths of an interested party's possible presentation to the Board on March 4.

Where, as here, KCSR's depositions will be designed to elicit information related to various competitive concerns, dealing not only with that transportation of grain but also with larger competition issues, the Board's liberal discovery rules should not be interpreted so as to impose highly prejudicial limitations on the efforts of concerned parties to make their presentations to the Board In the end, it will be the Board, and not Applicants, who will

decide if the information obtained via discovery establishes evidence of anti-competitive harms that should be addressed. For these reasons, the Board should not sanction Applicants' insistence that they may refuse to answer questions concerning discrete competition topics.

A. CP Seeks To Limit The Scope Of The Depositions Contrary To The Intent Of The Discovery Rules

As noted, in this case, KCSR has determined that the Transaction proposed by Applicants threatens anticompetitive impacts related to the transportation of grain and, more generally, that Applicants have not adequately proven the lack of anticompetitive impacts of the Transaction due to incomplete evidence on the subject contained in the Application (as supplemented). Depositions on this subject, therefore, should be as broad-based as possible to ensure that evidence of such impacts are not intentionally concealed by Applicants' asserted unwillingness to cooperate with certain lines of questioning. It is quite possible, as Applicants anticipate, that KCSR will ask questions related to an agreement now existing between IC&E and KCSR that could serve as an effective mechanism for protecting against anti-competitive impacts of the proposed Transaction with respect to the transportation of grain, particularly as respects competition among sources of grain for consumers located on KCSR's lines. Applicants toss in their intention to refuse to answer questions related to this agreement and its possible amelioration of anticompetitive impacts in a footnote at the tail end of their Emergency Motion, which footnote gives notice that individuals to be deposed will be instructed to refuse to answer specific and highly relevant lines of questioning.

Applicants' tail-end declaration of their refusal to cooperate with certain lines of questioning suggests that Applicants is the ultimate arbiter of that which is relevant to the proceeding and that which is not. In fact, it is for the Board to make such a call, based upon the rules and policies governing discovery in Board proceedings. Applicants' objection is

critical to KCSR's ability to conduct useful discovery, and the bases for the objection should have been fully articulated in the Emergency Motion, but they were not. In short, Applicants simply do not make the case for excluding any line of questioning that KCSR is likely to pursue in discovery, and so the Board should permit discovery to proceed without artificial constraints and without hasty judgments about subject matter that may or may not be considered off-limits.

The Board's discovery rules clearly allow for broad-based discovery to elicit information that is relevant or is likely to lead to relevant and admissible information. Accordingly, the Board's discovery rules must be liberally construed to enable interested parties to investigate fully the potential competitive impacts that may result from a transaction subject to Board review and approval. As the Board had occasion to note:

> The parties are reminded that discovery can be broad and may be obtained "regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding.. " and it is not grounds for objection that non-privileged information sought would itself be inadmissible so long as the request "appears reasonably calculated to lead to the discovery of admissible evidence." 49 CFR 1114.21. In view of the additional guidance we have provided here, coupled with the issuance of a protective order, we expect the parties to fully cooperate with each other on discovery.

Trailer Bridge, Inc v. Sea Star Lines, LLC, Docket No. WCC-104, Slip op. (STB served Oct. 27, 2000).

Moreover, the scope of discovery authorized by the Board's Rules of Practice is *modeled on the scope of discovery under the Federal Rules of Civil Procedure.* The Federal Rules of Civil Procedure "allow broad scope to discovery and this has been well recognized by the courts." Wright, Miller & Marcus, Federal Practice and Procedure: Civil 2d, § 2007 (1994) (citations omitted) The federal rule, which applies to all forms of discovery, is the broad standard against which KCSR's discovery requests must be evaluated. Moreover, there is no basis in the rules for Applicants to carve out "excepted" topics or subject matter

that Applicants would designate as "off limits" for depositions. In fact, by signaling their intent categorically to object to important lines of questioning that Applicants anticipate will be part of the depositions, Applicants have made clear that their willingness to be cooperative in the discovery process is a sham and have indicated that they will not adhere to the broad-based discovery contemplated under the Board's rules.

B. KCSR Should Be Able To Ask Any Question Related To The Competitive Issues Rather Than Limiting The Scope Of The Deposition

The possible anti-competitive impacts resulting from a proposed Transaction is a central consideration in the Board's statutory mandate to evaluate and act upon applications that propose a "significant" railroad consolidation transaction. Thus, any line of questioning related to the competitive impacts of the Applicants' proposed Transaction should be given wide latitude. To the extent that Applicants maintain that information obtained via deposition ultimately should not form the basis for remedial conditions, either because such information is arguably not relevant or for any other reason, Applicants will have an opportunity to make their case in reply to KCSR's comments, which KCSR would file on March 4 (and/or as supplemented thereafter if a deposition of Ms. McQuade must occur after March 4). It would be both unwise and highly prejudicial to KCSR to rule in advance upon the relevance of information obtained via discovery until such information can be presented via formal filings, and it would be premature and unfair to insist that KCSR should be circumscribed at this point to obtain information through discovery that it is certain will have a bearing on the Board's competition analysis of the proposed Transaction.

The essence of Applicant's argument about allegedly off-limits subject matter is that Applicants have already concluded that information that could be obtained from a line of questioning on deposition regarding an existing KCSR-IC&E grain transportation agreement would have no ultimate impact upon the Board's assessment of the Application In so doing,

Applicants have imputed to the Board the Applicants' own opinions about KCSR's concerns, but the Applicants do not speak for the Board, and the Applicants do not set the rules under which discovery or any other aspect of this proceeding moves forward Thus, the prudent course of action here would be for the Board not to license Applicants up-front and unjustified refusal to respond to certain lines of questioning, and to allow the parties to make their respective cases in the comment and reply phases of this proceeding about whether and/or how such information may bear upon the Board's competitive analysis. The Board's discovery rules envision no less.

III. KCSR SHOULD NOT BE PENALIZED FOR THE TIMING OF ITS REQUEST

As the Emergency Motion itself makes clear, KCSR and Applicants have been engaged in discussions on rail transportation matters of interest to both parties, which discussions were prompted by, and have taken place in the context of, the Application pursuant to 49 U.S.C. 11323, et seq., for approval of the acquisition of control of DM&E and IC&E by Soo Holding (and, indirectly, by CPR). KCSR had contemplated the resolution of its concerns via such discussions, and, in fact, DME had advised that such a negotiated resolution of KCSR's concerns would likely result from those discussions. In the interest of maintaining an amicable relationship and with the objective promoting settlement, KCSR chose not to embroil the parties in discovery that appeared until fairly recently to be avoidable and unnecessary

However, CPR has recently inserted itself into these discussions of interest to KCSR,[8] and CPR has advised, after considerable time and effort had been expended to reach

[8] When KCSR first reached out to the Applicants in response to the Application, CPR advised KCSR that settlement discussions should be undertaken as between KCSR and DME, because CPR viewed itself as non-essential to the resolution of KCSR's grain transportation concerns. Although this approach appeared unusual, KCSR proceeded accordingly.

an agreement with DME that the Applicants will not agree to address and resolve KCSR's concerns via settlement.[9] It was only after CPR abruptly closed the door to a negotiated arrangement that KCSR determined that it had no choice but to aggressively pursue its options by seeking remedies from the Board In retrospect, Applicants may have adopted their apparent bait-and-switch tactics long ago as a device to prevent KCSR from being able to fully pursue a remedy at the Board. As the Applicants allow, however, it is not too late for KCSR to take discovery, as is its rights under the Board's rules.

From the aftermath of this suddenly unsuccessful settlement dialogue, KCSR has moved as expeditiously as possible to protect the interest of its shippers and itself by engaging in discovery to bolster its upcoming presentation to the Board that the Application ought not to be approved without the imposition of conditions that would provide long-term security for the economical flow of grain from DME origins to consumers on KCSR's line south of Kansas City. In keeping with this new course, KCSR has tendered written discovery to the Applicants, to which the Applicants have represented they will respond. KCSR has also given notice of its intent to depose four of Applicants' officers and consultants, and here, too, Applicants give grumbling credence to KCSR's efforts at discovery by promising to make three of these individuals available for deposition at locations of Applicants' own preference

CONCLUSION

The Board's rules on discovery make it abundantly clear that depositions, like any other form of discovery, may be broad-based and should be engaged in with minimal interference and limitation from the Board. Here, KCSR has sought to take the depositions of four individuals, who, as KCSR has pointed out herein, possess information that is highly

[9] Evidence of this previously unforeseen stalemate has been provided by Applicants in Exhibit 3 to their Emergency Motion (letter of Paul A. Guthrie, CPR's Vice President – Law, to David C. Reeves, KCSR's Associate General Counsel, dated January 29, 2008).

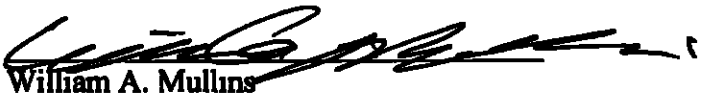
relevant to this proceeding and to KCSR's efforts to demonstrate that the proposed Transaction threatens anticompetitive impacts (which impacts may be made worse by CP's close ties to UP), and that this Transaction may have been compromised by CP's premature control of DME. Applicants agree to allow the deposition of three of these individuals to take place, provided certain highly relevant lines of questioning are recognized as off-limits, and they object to the proposed deposition of Ms. McQuade.

As has been shown above, KCSR is fully justified in seeking to depose Ms McQuade, and precedent confirms that she is no more immune from discovery than any of the three other individuals that the Applicants will make available. Accordingly, Applicants' Emergency Motion to quash the deposition of Ms. McQuade is inappropriate, prejudicial to KCSR, contrary to precedent and the Board's open policies toward discovery, and must be denied

In addition, Applicants efforts to circumscribe the scope of depositions by insisting in a footnote that certain lines of questioning pertaining to an agreement between KCSR and IC&E concerning the transportation of grain is unjustified and contrary to Board rules. In fact, to the extent that Applicants have made clear in advance that they will not cooperate with lines of questioning bearing on this highly relevant subject (which would constitute but one of many possible lines of questions), the Board should make clear that it expects those deposed to be forthcoming and not to so object. To be clear on the issue, the Board should compel the Applicants to proceed accordingly in connection with the noticed depositions. In

sum, the Emergency Motion should be denied in all respects so as to promote unfettered discovery as contemplated under the Boards rules, especially as those rules were revised in 1996

Respectfully submitted,



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Attorneys for The Kansas City Southern Railway Company

Dated: February 15, 2008

CERTIFICATE OF SERVICE

I have this day served a copy of the foregoing The Kansas City Southern Railway Company's Reply In Opposition To Applicants' Emergency Motion For Issuance Of A Protective Order upon all parties of record by depositing a copy in the U.S. mail in a properly addressed envelope with adequate first-class postage thereon prepaid, or by other, more expeditious means.

Dated: February 15, 2008

William A. Mullins

Attorney for The Kansas City Southern Railway Company